

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA  
3 BEFORE THE HONORABLE MIRANDA M. DU, CHIEF DISTRICT JUDGE  
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4 UNITED STATES OF AMERICA, :  
5 :  
6 Plaintiff, : No. 3:20-cr-26-MMD-WGC  
7 :  
8 -vs- : January 22, 2021  
9 :  
10 GUSTAVO CARRILLO-LOPEZ, : Reno, Nevada  
11 :  
12 Defendant. :  
13 \_\_\_\_\_ :

14 TRANSCRIPT OF MOTION HEARING

15 APPEARANCES:

16 FOR THE GOVERNMENT: PETER WALKINGSHAW  
17 Assistant United States Attorney  
18 Reno, Nevada

19 FOR THE DEFENDANT: LAUREN GORMAN and KATE BERRY  
20 Assistant Federal Public Defenders  
21 Reno, Nevada

22 CERTIFIED INTERPRETER: JUDY JENNER

23 Reported by: Margaret E. Griener, CCR #3, FCRR  
24 Official Reporter  
25 400 South Virginia Street  
Reno, Nevada 89501

1                   RENO, NEVADA, FRIDAY, JANUARY 22, 2021, 10:00 A.M.

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3  
4                   THE CLERK: Case 3:20-CR-26-MMD-WGC, USA versus  
5 Gustavo Carrillo-Lopez.

6                   The Spanish interpreter has been sworn.

7                   Defendant is in custody at Warm Springs  
8 Correction Center. He is on the telephone with the  
9 interpreter.

10                  Present on Zoom for the government is Peter  
11 Walkingshaw. Present on Zoom for the defendant is Lauren  
12 Gorman. Kate Berry listens to the proceeding via telephone.

13                  THE COURT: All right. Good morning, everyone.

14                  This hearing is set on the defendant's motion to  
15 dismiss the indictment which is docket number 26, and for the  
16 record I have reviewed the government's response, defendant's  
17 reply, as well as the two supplements the defendant filed.

18                  I'm going to give the government the opportunity  
19 to respond at least to the last supplement, which I still  
20 don't understand why it was filed shortly before the hearing  
21 even though the information offered could have been offered in  
22 connection with the motion or even the reply.

23                  I also want to assess from this hearing whether  
24 or not I should have an evidentiary hearing so I'm going to --  
25 I'll decide that at the conclusion of the hearing.

1 I want to address a preliminary issue and that  
2 is that, for the record, the defendant, Mr. Carrillo-Lopez, is  
3 participating in this hearing by phone. This hearing is  
4 conducted virtually with counsel on video and  
5 Mr. Carrillo-Lopez on the phone.

6 I want to make sure that Mr. Carrillo-Lopez  
7 understands, and I'm going to pose these questions to him.

8 Mr. Carrillo-Lopez, I want to make sure you  
9 understand that you have a right to have this hearing be  
10 conducted in person and that you have a right to attend this  
11 hearing in person, but it is a right that you can waive, and  
12 if you waive that right, the hearing can proceed with you  
13 participating on the phone.

14 Do you understand that you have those rights?

15 THE DEFENDANT: Yes. Yes, I do understand.

16 THE COURT: Did you talk to your attorney about  
17 your right to appear at this hearing in person and your  
18 decision to waive that right?

19 THE DEFENDANT: Yes, I did. I did talk to her  
20 about it.

21 THE COURT: And after talking to your attorney,  
22 is it your decision to agree to have this hearing be conducted  
23 on video and with you listening on the phone?

24 THE DEFENDANT: Yes, I am. I am in agreement.

25 THE COURT: All right. I have reviewed

1 Mr. Carrillo-Lopez's waiver of his right to appear at this  
2 hearing in person which is ECF number 34. I find that he  
3 understands his right, and that his waiver is a knowing and  
4 voluntary waiver.

5 I also find that because of the spread of  
6 COVID-19 in this district, having this hearing proceed in  
7 person would affect the health and safety of everyone  
8 involved, but that delaying the hearing would not serve the  
9 interests of justice, and for those reasons I'm going to  
10 accept the waiver and proceed with this hearing with  
11 Mr. Carrillo-Lopez participating by phone.

12 So as indicated to you, counsel, I don't know  
13 yet whether or not an evidentiary hearing is warranted. As it  
14 stands, Ms. Gorman has requested an evidentiary hearing, the  
15 government has not. The government, of course, can change its  
16 position. I'll decide at the end of the hearing whether an  
17 evidentiary hearing is needed.

18 I also want you to focus your arguments with the  
19 understanding that I'm going to find that the *Arlington*  
20 *Heights* framework applies, and that is that the  
21 defendant's argument here is that the statute -- that  
22 Section 1326 violates his Equal Protection rights by way of a  
23 disparate impact theory so I think that the framework of  
24 *Arlington Heights* applies. You can focus your arguments on  
25 that.

1                   With that, I will hear arguments from counsel,  
2                   and I will start with Ms. Gorman.

3                   MS. GORMAN: Thank you, your Honor.

4                   And, your Honor, I would ask that the Court  
5                   consider hearing the testimony of the -- particularly the  
6                   historian Professor Hernandez from UCLA. She's a recipient of  
7                   the MacArthur Grant, and she has studied and written  
8                   extensively about the statute and its historical origins.

9                   And I would also invite the Court to interrupt  
10                  me at any time. I had initially prepared an oral argument  
11                  which is rather lengthy, and -- but I want to be as responsive  
12                  as possible to this Court's concerns, so please feel free to  
13                  interrupt me at any time.

14                  But since this Court has already held that the  
15                  *Arlington Heights* factors applies, I think that the  
16                  appropriate place is to start with the legislative history of  
17                  this case and particularly the government's arguments  
18                  regarding the reenactments.

19                  In terms of the statute that was passed in 1929,  
20                  that historical framework is extremely important. Much of it  
21                  is in the Congressional Records, but as the Court has read  
22                  from the declaration of Professor Hernandez and from the  
23                  legislative history provided to the Court, the initial idea to  
24                  criminalize reentering the United States after deportation was  
25                  initially -- that was the 1929 legislation which exists in

1 substantially the same form today despite these reenactments  
2 which essentially make it even more punitive and more harsh.

3 THE COURT: But wasn't there enough of a  
4 sufficient break between the 1929 statute and the 1952 version  
5 of the statute and enactment such that -- so this is where  
6 I -- one of the issues for me, is there enough of a -- was the  
7 1952 reenactment sufficiently distanced from the 1929 statute  
8 such that even if the legislative history indicates  
9 discriminatory intent, that it cannot be considered with the  
10 1952 enactment?

11 MS. GORMAN: Your Honor, I think the answer to  
12 that question is no, and I don't think that it's -- that it  
13 can never be the case that a legislative reenactment -- during  
14 this case it was largely just a recodification -- can save  
15 legislation that is essentially the result of pervasive racial  
16 animus.

17 But one thing that I -- one of the questions  
18 that this Court asked at the beginning of the hearing is why I  
19 filed that supplement after the case was already briefed, and  
20 the short answer is nothing too exciting other than in doing  
21 as much of a deep dive as I could into the 1952 legislation I  
22 came across a few things.

23 One is a 1977 case which I'll read into the  
24 record, *United States versus Ortiz-Martinez*, 557 F.2d 214, and  
25 I'm quoting from 216, and it specifically says, "Regarding the

reenactment of this legislation" -- sorry.

"An exhaustive reading of the congressional debate indicates that Congress was deeply concerned with many facets of the Immigration and Nationality Act of June 27th, 1952, but sections 1325 and 1326 were not among the debated sections."

"The House Report contains only this brief description of the sections."

Quote, "In addition to the foregoing, criminal sanctions are provided for entry of an alien at an improper time or place, for misrepresentation and concealment of facts, for reentry of certain deported aliens..."

And then it quotes to the 1952 Congressional Record, and, of course, your Honor has that case as part of the supplements.

Another interesting fact that I came across is that President Truman actually vetoed this bill. His veto was ultimately overridden, but one of the comments he made in vetoing it were that,

"Many of the aspects of the bill which have been most widely criticized in the public debate are reaffirmations or elaborations of the existing statutes or administrative procedures. Time and again, examination discloses that the revisions of

1 existing law that would be made by the bill are  
2 intended to solidify some restrictive practice of our  
3 immigration authorities, or to overrule or modify  
4 some ameliorative decision of the Supreme Court or  
5 other federal courts. By and large, the changes that  
6 would be made by the bill do not depart from the  
7 basically restrictive spirit of our existing law but  
8 intensify and reinforce it."

9 That veto was overturned, but it was also very  
10 prescient. And I think part of the -- the reason that  
11 precipitate, I think, the challenge that we are raising now --  
12 and it's not just me who is raising it but multiple federal  
13 defenders have raised an Equal Protection challenge -- also  
14 comes from Supreme Court dicta in two cases in 2020.

15 So -- and I'm referring to the *Espinoza* case and  
16 the *Ramos* case. In particular I'll highlight Justice Alito's  
17 statements in *Espinoza*.

18 "I argued in dissent that this original  
19 motivation, though deplorable, had no bearing on the  
20 law's constitutionality because such laws can be  
21 adopted for nondiscriminatory reasons, and 'both  
22 states readopted their rules under different  
23 circumstances in later years.' But I lost, and *Ramos*  
24 is now precedent. If the original motivation for the  
25 laws mattered there, it certainly matters here."



1                   And that would be *Espinoza v Montana Department*  
2                   *of Revenue*, 140 Supreme Court 2246 at 2268.

3                   THE COURT: So if the original -- the  
4                   legislative history of the original enactment, the 1929  
5                   enactment, matters in terms of demonstrating discriminatory  
6                   intent, can a later reenactment ever be untainted absent some  
7                   kind of specific repudiation from Congress?

8                   MS. GORMAN: I think the answer to that is  
9                   nuanced.

10                  I think that what the Supreme Court has stated  
11                  now in dicta stems from multiple cases even before *Ramos* and  
12                  even before *Espinoza*.

13                  But one of the Justice Sotomayor's -- one of the  
14                  statements she made in the *Ramos* case I think speaks to that  
15                  specific issue, and as I pointed out in the motion, Supreme  
16                  Court dicta should be entitled to great weight.

17                  So *Ramos* was a Sixth Amendment case, but Justice  
18                  Sotomayor actually talked about it in the context of Equal  
19                  Protection. So she states that,

20                  "The majority vividly describes the legacy of  
21                  racism that generated Louisiana's and Oregon's laws.  
22                  Although *Ramos* does not bring an Equal Protection  
23                  challenge, the history is worthy of the Court's  
24                  attention. That is not simply because that legacy  
25                  existed in the first place -- unfortunately, many

1 laws and policies in this country have some history  
2 of racial animus -- but also because the states'  
3 legislatures never truly grappled with the laws'  
4 sordid history in reenacting them."

5 And she cites *United States v Fordice*,"  
6 which stands for "policies that are 'traceable' to a  
7 state's *de jure* racial segregation and still 'have  
8 discriminatory effects' offend the Equal Protection  
9 Clause."

10 So, "Where a law is otherwise untethered to  
11 racial bias -- and perhaps when a legislature  
12 actually confronts the law's tawdry past in  
13 reenacting it -- the new law may well be free of  
14 discriminatory taint. That cannot be said of the  
15 laws at issue here. While the dissent points to the  
16 'legitimate' reasons for Louisiana's  
17 reenactment...Louisiana's perhaps only effort to  
18 contend with the law's discriminatory purpose and  
19 effects came recently, when the law was repealed  
20 altogether."

21 So I think the short answer to that is no. This  
22 is essentially the same law it criminalizes, and the fact that  
23 the government has continued to double down on this law I  
24 think makes it worse. I think it's contrary to the  
25 government's position that it cleanses it from racial animus.

1           And this Court can see, I think, even from this  
2 state -- one of the -- first of all, one of the supplements  
3 that I filed was also the U.S. Attorney Bulletin from 2017,  
4 and, again, nothing particularly interesting other than the  
5 United States Attorney has long described this law as  
6 hundred-year history, and that has always been in sort of  
7 defense of this law.

8           And it is only when we do this legislative  
9 probing and talk about the historical context of the law that  
10 the United States wants to back away from the statement that  
11 1929 was essentially the first version of this act and since  
12 then it has gotten even more punitive.

13           And as this Court, of course, knows, it's far  
14 easier to reenact legislation that already exists or to tweak  
15 legislation that already exists.

16           But that original enactment was clearly  
17 motivated by racism. It was a compromise between eugenicists  
18 and particularly agricultural sectors who wanted to maintain a  
19 cheap supply of Mexican labor.

20           And I think that the Court also sees that in  
21 practice this court has a discriminatory effect. I don't  
22 think that it was probably ever lost on this Court that  
23 1326 cases have always been treated differently than other  
24 cases.

25           I talked in one of the -- or in one of the

1 supplements that I filed I provided information, for example,  
2 about Operation Streamline.

3 So under the prior administration, the United  
4 States Attorneys were told you have no discretion, we're going  
5 to focus on the southern border and you will take every one of  
6 these cases, and Operation Streamline actually precedes that.  
7 It started 2005 under the Bush administration, and it allowed  
8 for these giant mass proceedings, and one of the cases I  
9 provided to this Court held that that proceeding violated  
10 Rule 11.

11 But I would ask this Court to imagine a kind of  
12 mass proceeding with a hundred brown people shackled to each  
13 other and arraigned, pled, and sentenced in the same exact  
14 proceeding, and ask whether that would truly happen today if  
15 racial animus was not still so very deeply a part of this law.

16 And I think that reenactment has potentially  
17 given courts a way to avoid actually reckoning with the racism  
18 that is at the heart of this law, that that racism is apparent  
19 at every part of this.

20 Our 1326 clients -- the Bail Reform Act  
21 explicitly applies to them, but it actually doesn't in  
22 practice. They don't get released. I've had one 1326 client  
23 released in ten years and that was after a trial.

24 But at the end of the day our 1326 clients  
25 continue to be treated differently, and the focus of the

1 government is on the southern border.

2 And we also have neighbors to the north that are  
3 treated very differently. A, they're not prosecuted, but also  
4 the law is tailored so that they won't be prosecuted. For  
5 example, if you're going to come to America from Mexico, you  
6 need a visa. You do not need a visa to come from Canada, and  
7 we do not criminalize visa over-stayers.

8 So every facet of this law from its original  
9 inception to the way that it is currently prosecuted and  
10 treated I think displays this animus in full force.

11 And I think the great danger --

12 THE COURT: So what you cite to, though, is -- I  
13 see it as the disparate impact of the law as applied which is  
14 a different -- I see it as a separate analysis from evidence  
15 of discriminatory intent or purpose.

16 I know the government's argument is that there's  
17 no disparate impact, that geography plays a factor. I don't  
18 agree with that, but I also think that the way the law has  
19 been enforced, as I said, may show -- supports the argument  
20 there's disparate impact, but I don't know that it supports  
21 the discriminatory intent as evidence when the law was  
22 enacted.

23 But let me -- I want to go back to something you  
24 indicated earlier. You cited to the *Ortiz-Martinez* decision  
25 in the supplement, that's ECF 33, and specifically you

1 indicated that in that case the Court noted that -- and I'm  
2 going to quote,

3 "An exhaustive reading of the Congressional  
4 debate indicates that Congress was deeply concerned  
5 with many facets of the Immigration and Nationality  
6 Act of June 27, 1952, but 1325 and 1326 were not  
7 among the debated actions."

8 So my question is, doesn't that imply that there  
9 was no formal repudiation, condemnation, or at least concern,  
10 so that's enough -- and so if that's the case, would that be  
11 enough then for the discriminatory motive of the original  
12 enactment if I were to find that there was discriminatory  
13 motive with the original enactment applied to the later  
14 reenactment?

15 In other words, what would the 1952 Congress  
16 have to do to cleanse the law from its former racial animus?

17 MS. GORMAN: I think the answer to that stems  
18 largely from Supreme Court dicta, and it's not just those two  
19 cases. I also wanted to address some of the cases that the  
20 government cited regarding reenactment.

21 But I think a short answer to your question is  
22 yes. If you have -- you have an obligation as a legislator,  
23 as a lawmaker, to understand the laws that you are enforcing.

24 The 1929 law was clearly motivated by racial  
25 animus. A decision to reenact it silently is exactly the --

1 is the greatest danger of reenactments, and it's the greatest  
2 danger of the government's position that they allow racist  
3 legislation to survive while allowing courts, to the extent  
4 they are willing to, to ignore the language that actually  
5 makes it challengeable.

6 And, as I said before, it's easier to tweak a  
7 law, it's easier to reenact a law that's already on the books  
8 than to introduce brand-new legislation and to explain why the  
9 brand-new legislation needs to exist.

10 But their silence I think speaks volumes because  
11 that Congressional Record is not a secret, it is in there, it  
12 is incumbent on them to know that legislation and to  
13 understand its origins and its roots.

14 And if the Court finds that racial animus  
15 pervaded and was one of the causes of the 1929 statute and  
16 they kept that law in place -- 1952 essentially reorganized a  
17 large amount of criminal laws, but it didn't really touch --  
18 it didn't touch 1325 and 1326.

19 And so -- and I do want to address actually  
20 other cases regarding reenactment, but what I also want to  
21 touch on is I agree to some extent with this Court's comment  
22 that the fact that 1326 has been prosecuted in ways that I  
23 think we would find shocking and unacceptable if -- let's say  
24 this was a white man charged with fraud, you would never see  
25 this kind of hearing.

1           But it has become so deeply ingrained in our  
2 culture, this anti-immigrant sentiment, that we largely do not  
3 question the fact that 1326 is actually treated in different  
4 ways than other statutes.

5           And while I agree that it affects disparate  
6 impact, the *Arlington Heights* factors were nonexhaustive, so  
7 if we are challenging legislation, and if one of the questions  
8 is whether we can infer the racial animus in the 1929 law to  
9 the law as it exists today, I think one of the factors that  
10 would be permissible for the Court to consider is how it is  
11 treated and what due process protections are afforded to  
12 migrants.

13           And I don't think it can escape scrutiny that,  
14 particularly in the past four years there has been an  
15 obsessive and a true obsession with the criminalization of  
16 migration to the extent that it is -- I think the most -- 1325  
17 and 1326 are combined the most prosecuted offenses in the  
18 United States.

19           And theoretically the United States Government  
20 is here to actually promote public safety, but the fact that  
21 we are exclusively focusing on migrants of the southern border  
22 I think says something about what we as a society and culture,  
23 and I think it can be inferred from the legislative silence,  
24 are willing to permit.

25           It's no longer acceptable to talk about mongrels



1 and eugenics and breeding horses, all of which are actually  
2 part of the legislative record, but it's very easy to replace  
3 those with race neutral words like alien or criminal alien,  
4 but it comes from the same place.

5 And I don't think you can separate the racial  
6 animus that resulted and the fact that this is the law, that  
7 it is illegal, after you are deported and you are reentered,  
8 that you are prosecuted for a felony.

9 I don't think you can separate that from today,  
10 especially when there has been an absolute refusal to  
11 acknowledge it. And that's even apparent in the government's  
12 response where it wouldn't even acknowledge that this talk  
13 about eugenics, which is in the Congressional Record, is  
14 racist. We can't even agree on that point.

15 And if we can't agree that the 1929 statute was  
16 motivated by racial animus, I think then there is two very  
17 different ideas about what racial animus is, but I would argue  
18 that eugenics certainly fits the bill.

19 And whether you want to call it aliens or  
20 criminal aliens or that we should dedicate all of our  
21 enforcement efforts to the southern border, it is hard to  
22 escape that racial animus continues to pervade this law.

23 Another interesting fact was in 1952 I learned  
24 that there was one Latino congressperson in total in the  
25 entire congressional body that essentially recodified 1325 and

1 1326.

2 But I think under Supreme Court dicta, which  
3 this Court must afford great weight, if a policy is traceable  
4 to -- in that case it was segregation -- then -- and it has  
5 discriminatory effect, it offends the Equal Protection clause.

6 That language applies with equal force to racism  
7 as Justice Sotomayor stated so eloquently in *Ramos v*  
8 *Louisiana*.

9 But with respect to the reenactments, I also do  
10 want to address some of the cases the government cited to  
11 argue that reenactments, even if they don't reckon with or  
12 talk about the racist origin of the law, are sufficient to  
13 cleanse it.

14 So one of the cases primarily relied on the  
15 government was *Mobile v Bolden*, and I'll cite it as 446 U.S.  
16 55, and the government cited at 74. This is a 1980 Supreme  
17 Court case.

18 And it specifically says asking whether  
19 discriminatory intent has been proved as to the particular  
20 enactment at issue because,

21 "...past discrimination cannot, in the manner  
22 of original sin, condemn governmental action that is  
23 not itself unlawful."

24 So I think what's important to note about this  
25 case is that that case was first superseded by statute, by

1 Section 2 of the Voting Rights Act, but it was also rejected  
2 in substance by the Supreme Court in *Rogers v Lodge* which I  
3 touched upon in my reply.

4 But *Rogers v Lodge* actually went further, and it  
5 went so far as to reject systems that are neutral in origin  
6 but have been subverted in invidious purposes.

7 And, for context, that was a decision where the  
8 Court held that an at-large system election in Burke County  
9 violated Equal Protection, and the Court held that there was  
10 sufficient evidence that the at-large system was operated as a  
11 device to further racial discrimination, and that there was  
12 extensive historical evidence that the county had impeded  
13 political participation of black citizens, and it ultimately  
14 upheld a system of single-member district established by the  
15 district court.

16 And that was two years after *Mobile v Bolden*.

17 And probably more relevant to this case is the  
18 Court said that,

19 "Evidence of historical discrimination is  
20 relevant to drawing an inference of purposeful  
21 discrimination, particularly in cases such as this  
22 one where the evidence shows that discriminatory  
23 practices were commonly utilized, that they were  
24 abandoned when enjoined by courts or made illegal by  
25 civil rights legislation, and that they were replaced

1 by laws and practices which, though neutral on their  
2 face, serve to maintain the status quo."

3 And the pin cite to that is 625.

4 The Court went on to discuss *Arlington Heights*  
5 and *Washington v Davis*.

6 I think particularly that the government relied  
7 so heavily on *Mobile v Bolden* that it's important to  
8 understand that the Court repudiated that logic and reasoning,  
9 not just because it was superceded by statute, but also in  
10 substance.

11 And I'll also say the government misrepresents  
12 the holding in *Abbott v Perez* where the Court explained that  
13 the presumption of legislative of good faith is not changed by  
14 finding of past discrimination.

15 But that's actually not what *Abbott v Perez* was  
16 about, and it supports Mr. Carrillo-Lopez, because in that  
17 case the Court ultimately -- the sort of challenged statute  
18 was a 2011 predecessor statute to a 2013 one.

19 And so the Court specifically said, well, the  
20 2013 legislature didn't reenact the plan previously passed by  
21 its 2011 predecessor, and it relied on that in upholding this  
22 2013 law.

23 But I don't think you can cite that case to say  
24 that reenactments are sufficient to cleanse a law,  
25 particularly if they fail to reckon entirely with the racial

1 animus that is responsible for this law existing in the first  
2 case.

3 THE COURT: So --

4 MS. GORMAN: I'm sorry, your Honor.

5 THE COURT: I'm sorry, were you finished with  
6 your argument relating to reenactment?

7 MS. GORMAN: I was, your Honor.

8 THE COURT: You offer in the first supplement a  
9 decision -- this is ECF 31 -- from the Southern District of  
10 California where that Court, well, rejected and denied the  
11 motion to dismiss challenging Section 1325, and there the  
12 District Court ultimately found that the subsequent  
13 reenactment of the statute cleansed it of its discriminatory  
14 animus.

15 Why shouldn't I find that analysis persuasive  
16 with respect to Section 1326 here?

17 MS. GORMAN: So I largely provided the Court  
18 that to -- so, A, I don't agree with the Court's ultimate  
19 conclusion, and ultimately the Ninth Circuit will have to  
20 decide that issue.

21 But the Court was able to sort of accept that  
22 the racial animus pervaded it, accept, as this Court did, the  
23 *Arlington* factors.

24 But specifically that individual was charged  
25 with attempt which wasn't even part of the statutory stream in

1 any way until 1990.

2 So in contrast, 1326 is substantively the same  
3 making it a felony for somebody who has been previously  
4 deported/removed, when they come back to this country, to then  
5 be convicted of a felony.

6 And so the Court -- I don't necessarily agree  
7 that the attempt gives it an out because I think 1325 is  
8 similarly animated by the same racial discrimination as 1326.

9 But I do think that part of that Court's holding  
10 is important, which is that *Arlington Heights* does apply  
11 because the government's primary -- and so while I disagree  
12 with the holding, and I don't think the fact that it's -- the  
13 fact that attempt was introduced in 1990 necessarily changes  
14 anything because ultimately it's an attempt to do -- to commit  
15 a 1325.

16 But at the end of the day I do think what is  
17 fundamentally important about that decision and why it was  
18 worthy of mentioning -- so the government's main argument is  
19 that when we're talking about immigration law, and the Court  
20 has said that in order to enforce immigration law the  
21 government may use criminal statutes.

22 It differentiates that from the argument that  
23 *Arlington Heights* applies when racial animus is the motivating  
24 factor, and that the fact that a law is ostensibly to regulate  
25 immigration can't -- does not permit racist laws to exist

1 particularly in the context of criminal law, and so that, at  
2 least, part of the holding I think is relatively important.

3 THE COURT: All right. Thank you.

4 MS. GORMAN: But, no, I do not -- I obviously do  
5 not agree with the holding that the fact that this person who  
6 was prosecuted under attempt which was introduced for the  
7 first time in 1990 would be enough to cleanse it.

8 So I think this case is distinguishable both on  
9 the statute itself, because the statute is essentially the  
10 same statute. We're not dealing with an attempt statute, and  
11 I think that was an easy out for that Court.

12 But with 1326 we essentially have the same  
13 statute other than harsher and harsher and harsher penalties,  
14 and -- I'd note.

15 So at least I hope that clarifies why I think  
16 that supplement was important even though I understand that it  
17 doesn't fully support this position, I think it's  
18 distinguishable both on its facts and its reasoning.

19 THE COURT: So if I were to agree with the  
20 defendant and grant the motion, what would be the effect? It  
21 would -- because a challenge here in a way, it's kind of an  
22 as-applied challenge to those who are of Mexican citizenship.  
23 And so would the statute be unconstitutional as applied to  
24 this defendant and perhaps maybe extends to any defendant who  
25 is of Mexican citizenship?

1 I was just thinking of what the -- the theory  
2 that's being brought here and the impact if I were to grant  
3 the motion, not that that's --

4 MS. GORMAN: So my understanding is that the --

5 THE COURT: -- that important.

6 MS. GORMAN: My understanding is that the impact  
7 of this case would be that the indictment against  
8 Mr. Carrillo-Lopez would be dismissed, and ultimately this --  
9 the various holdings of various courts will ultimately  
10 percolate up to the Ninth Circuit, ultimately to the Supreme  
11 Court, and that will ultimately decide whether this statute  
12 can stand notwithstanding the racial animus from 1929.

13 But at least in terms of the direct impact, the  
14 indictment against Mr. Carrillo-Lopez would be dismissed, and  
15 I -- you know, I added a section about Mr. Carrillo-Lopez,  
16 though this is not a challenge that is sort of particular to  
17 him, because I think in some very deep ways this case sort of  
18 demonstrates how untethered this hatred of migrants has become  
19 from any rational public safety rationale and any rational  
20 sort of immigration issue.

21 Mr. Carrillo-Lopez is serving a life sentence  
22 for a nonviolent drug offense, and yet it -- and yet the  
23 decision is that if he somehow manages to, I guess, get  
24 paroled before he dies, then he should still be criminally  
25 prosecuted and sentenced to federal prison in spite of the



1 fact that he is already being punished so incredibly severely.

2 And I think this case in some ways sort of  
3 illustrates that animus, but while it's not part of the actual  
4 underlying legal argument, A, I think it's important for his  
5 name to be part of this record as he is a human being and the  
6 history of this legislation has so deeply dehumanized migrants  
7 that to actually say that he is a human being with a name,  
8 that he is a person, was just important for both the record  
9 and just out of respect and to honor Mr. Carrillo's humanity  
10 at the end of the day, but I think the result of this Court's  
11 decision would be the dismissal of the indictment against him.

12 And ultimately these challenges will percolate  
13 up, and whether or not that statute ultimately fails will not  
14 be as a necessary result of this Court's ruling, but as this  
15 country sort of grapples with the racial animus in general,  
16 and as we -- I mean, this country is already grappling with  
17 racial animus in the statute.

18 One of the sections that I cited -- I don't mean  
19 to be all over the map, your Honor, was that in 2019, in  
20 December 2019, Congressman Garcia introduced legislation which  
21 now has 44 co-sponsors recognizing that 1326 and 1325  
22 prosecutions, but for the purposes of this case 1326, have a  
23 racist origin, and if we truly want to eradicate racism, then  
24 those laws must be repealed.

25 And by the time you have a piece of legislation

1 and a contemporary Congressional Record openly acknowledging  
2 the racial animus of a law, I honestly think the writing is on  
3 the table, that I hope my children and my children's children  
4 will not see this law, that the word alien or criminal alien,  
5 race neutral though they may be, will be recognized for the  
6 racist dog whistles that they are.

7 But I think whether that starts with this Court  
8 and Mr. Carrillo-Lopez, or whether it percolates into these  
9 other courts, I do think that at the end of the day this  
10 statute will not stand, and that the racial history has to be  
11 reckoned with if we're going to have an intellectually honest  
12 and morally honest jurisprudence, and I think the 2020 Supreme  
13 Court --

14 THE CLERK: Your Honor, Ms. Gorman had indicated  
15 she was having problems with her Internet connection this  
16 morning, and I believe that she will be joining us in just a  
17 minute via her cell phone. I'll send her a message.

18 THE COURT: I think -- Ms. Gorman, your screen  
19 froze when you referenced -- I think you ended with "I think  
20 the 2020 Supreme Court," and then you cut off.

21 MS. GORMAN: So the 20 -- those two decisions in  
22 the Supreme Court --

23 THE COURT: You are talking about *Ramos* and  
24 *Espinoza*?

25 MS. GORMAN: Yes.

1           The recognition that we have to grapple with  
2 legislative histories of racially -- of racist laws is  
3 important, and Supreme Court dicta has to be afforded great  
4 deference just under the law.

5           And by the time the Supreme Court is openly  
6 acknowledging, and we are having uncomfortable conversations  
7 about the history of pieces of legislation or, in *Ramos*' case,  
8 nonunanimous juries in Louisiana, that there is a broader  
9 recognition that racism is intolerable, and whether it comes  
10 in the form of race neutral statutes that are aggressively  
11 prosecuted against migrants in the southern border without  
12 discretion to the United States Attorneys, or whether we're  
13 talking about nonunanimous juries in Louisiana, that we can't  
14 escape that history if we are going to actually cleanse our  
15 jurisprudence of racism which I think -- I hope everybody  
16 agrees is wrong morally and legally and that the Equal  
17 Protection clause doesn't tolerate it.

18           THE COURT: But those two decisions don't  
19 involve Equal Protection or even the *Arlington Heights*  
20 analysis, do they?

21           MS. GORMAN: They do not.

22           It was Justice Sotomayor's reference in *Ramos*  
23 that specifically was the dicta that while -- A, would stand,  
24 I believe, for the general proposition that when you are  
25 evaluating the constitutionality of a law that you look beyond

1 its reenactments.

2 And I think that's particularly important  
3 because reenactments are so incredibly effective and powerful.  
4 They allow you to accept racism by your silence. And so if we  
5 were to accept the proposition that a reenactment of a law, no  
6 matter how motivated it was by eugenical zeal, and just accept  
7 that silence on the issue is sufficient to cleanse it, that  
8 that would not honor the Constitution's commitment to racially  
9 neutral law.

10 And so those two cases both stand for that  
11 general principle that you have to -- that you can look and  
12 you have to actually look beyond reenactments and  
13 codifications, especially in this case when you're dealing  
14 with a law that has essentially remained the same.

15 But specifically Justice Sotomayor actually  
16 talked about the Equal Protection clause. It wasn't an Equal  
17 Protection clause challenge, but she felt it necessary to say,  
18 look, if this was an Equal Protection clause challenge, this  
19 would offend that, too.

20 And so when I talk about Supreme Court dicta, I  
21 talk both about the general principle that when we analyze the  
22 constitutionality of a statute, we can't let a reenactment  
23 that never reckoned with the racist reasons for a law's  
24 existence to cleanse it of that animus, but also specifically  
25 Justice Sotomayor's comments and concurrence in *Ramos*.

1 THE COURT: All right. Thank you, Ms. Gorman.  
2 Mr. Walkingshaw?

3 MR. WALKINGSHAW: Thank you, your Honor.

4 And I'll try and keep my comments as narrowly  
5 focused on the legal issues before the Court as possible, and  
6 if at any point the Court has any questions, please feel free  
7 to interrupt me.

8 But I think I need to begin accepting the  
9 Court's premise that we'll proceed on the *Arlington Heights*  
10 framework.

11 The defendant's motion is premised entirely on  
12 the proposition that the portions of *Ramos* and *Espinoza* that  
13 we were just discussing establish a freestanding principle  
14 that a -- that reaching back into the history of subject  
15 matter -- subject areas of law can be a valid basis to  
16 invalidate later enactments. That simply is not what those  
17 cases stand for.

18 So in *Ramos*, the discussion of the law's history  
19 falls within a repudiation of a functional analysis of the  
20 Sixth Amendment right to a jury trial.

21 In a majority opinion, the -- Justice Gorsuch's  
22 opinion took up the functional analysis in a precedent that it  
23 was overruling, which is the *Apodaca* case, and it said that  
24 basically the -- the functional analysis done in *Apodaca*  
25 focused on, you know, whether or not it would reduce the

1     likelihood of hung juries.

2                     And the quote from the majority opinion is who  
3     can profess confidence in such a breezy functional analysis, a  
4     breezy cost benefit analysis such as that.

5                     And it went on to discuss that the functional  
6     analysis taken up there was not only faulty in the -- in its  
7     execution, and that's where the discussion of the law's  
8     history comes in and says that it failed to take into account  
9     the fact that it was essentially adopted originally to  
10    disenfranchise African-American jurors.

11                    It says that our problem with this analysis is  
12    not that it's, quote, skimpy, but that it was done at all.

13                    Ultimately the *Ramos* case hinged entirely upon  
14    what the Sixth Amendment right to a jury trial meant, and what  
15    the Court concluded was that meant at common law and at the  
16    adoption of the Constitution that the Sixth Amendment right  
17    included a right to a unanimous jury.

18                    Now, there was a dissent by Justice Alito that  
19    took issue with this analysis, but the point of agreement  
20    between the majority and the dissent in that case was what  
21    does that history have to do with the holding in that case?  
22    Nothing.

23                    THE COURT:   What about -- Ms. Gorman is pointing  
24    out to Justice Alito's concurrence in *Espinoza* which suggests  
25    that the original motivation of the laws do matter.

1 MR. WALKINGSHAW: Well, your Honor --

2 THE COURT: In fact, she quoted the statement  
3 from his concurrence that, if I quote,

4 "If the original motivation for the laws  
5 mattered there," i.e., in *Ramos*, "it certainly  
6 matters here."

7 MR. WALKINGSHAW: Yes, your Honor.

8 And I think it's extremely important to note  
9 there that that was a solo concurrence joined by no other  
10 justices. It's crucial to note that while Justice Alito  
11 objected to the discussion in *Ramos*, he brought forth a  
12 similar analysis in *Espinoza*, and no other justice joined him.  
13 It's just clearly not the law of the Supreme Court. Justice  
14 Sotomayor was the only one to take up that -- that argument at  
15 all that's in the dicta discussed in the defendant's brief.

16 But at the end of the day the Supreme Court has  
17 said time and time again, as have other federal courts, that  
18 when you conduct an *Arlington Heights* analysis, you look at  
19 the motives behind the government officials taking the  
20 challenged action.

21 And I'll turn briefly -- well, I think perhaps  
22 the most recent and definitive statement on whether or not  
23 this theory holds water would actually be --

24 THE COURT: So if -- I want to follow up on what  
25 you just said.

1           If I accept that you look at the motive of the  
2 challenged action, does that mean that -- in a way it seems  
3 circular. So every time there's a reenactment, the Court has  
4 to ignore any legislative history relating to the prior  
5 enactment?

6           MR. WALKINGSHAW: Your Honor --

7           THE COURT: In other words, does a reenactment  
8 automatically cleanse any racial animus that animated from the  
9 earlier enactment?

10          MR. WALKINGSHAW: Well, your Honor, I think the  
11 important thing is to look at the people taking the decision.

12          So the DHS provision -- I think the clearest  
13 statement on this issue is that statements that are, quote,  
14 remote in time and context are not probative.

15          And in the *Department of Homeland Security*  
16 *versus Regents of California* decision, the Supreme Court said  
17 very clearly that statements by the president, President  
18 Donald Trump, before and after election, and the president  
19 became the head of the executive, that his statements  
20 regarding the DACA program were not probative of the issue of  
21 whether or not the determination to terminate DACA was  
22 motivated by racial animus, and that's -- that's a difference  
23 of less than two years.

24          I think the important thing here --

25          THE COURT: Well, isn't context important?



1 Because in the 1326 context, as Ms. Gorman argues, the  
2 subsequent reenactment merely adds additional punitive --  
3 really made the violation more punitive.

4 MR. WALKINGSHAW: So, your Honor, I wouldn't  
5 agree with that characterization.

6 THE COURT: Why not?

7 MR. WALKINGSHAW: Subsequent amendments did  
8 add -- subsequent amendments did add additional penalties such  
9 as raising crimes, but they were part of larger immigration  
10 reform bills.

11 And the fact that they were reenacted doesn't --  
12 they still go through the process of bicameralism at  
13 presentment. Again, the fact it might not have been discussed  
14 extensively on the Senate or House floor doesn't mean that  
15 they're not reviewed by congressional aides, that the  
16 congressmen don't read the bill.

17 There's a -- I think the Court can appreciate  
18 that the process of passing a law through Congress is not a  
19 simple pro forma act, and, moreover, in the subsequent  
20 amendments to the legislation, the 1965 revision we discuss in  
21 our papers, was concerned with racial -- was concerned with  
22 nationality quotas.

23 I believe the amendment in 1990 introduced a  
24 temporary protective status which primarily benefitted  
25 citizens from El Salvador allowing them to come into the

1 country and maintain a permanent status due to strife there.

2 The fact of the matter is that when these --  
3 when these laws are reenacted, they go through a process, and  
4 the courts have been very clear, it's not for the courts to  
5 somehow create some disabling mechanism for the democratic  
6 process, that if the -- if congressmen don't specifically  
7 identify past instances of the law and the motives behind  
8 them, that they're somehow disabled from passing them in the  
9 future.

10 It's been very clear -- the Supreme Court has  
11 been very clear that past discrimination does not carry  
12 forward from one legislature to another in the manner of  
13 original sin.

14 Ms. Gorman discussed the *Abbott versus Perez*  
15 case. I think it's very instructive in that the Supreme Court  
16 upheld a voting plan that was explicitly based on a voting  
17 plan that had been adopted by the Texas legislature two years  
18 prior and had been found by the Supreme Court to be  
19 discriminatory and a violation of the Equal Protection clause  
20 and of the Voting Rights Act, and the Court said ultimately  
21 you need to look at the -- you need to look at the motives  
22 behind the people adopting the legislation and that good faith  
23 is presumed.

24 When Americans send legislators to enact their  
25 policy preferences, we have to presume that they're -- that

1 they're moving -- that they're moving forward in good faith,  
2 and statements taken from 20 years removed when not a single  
3 legislator from the 1929 Congress participated in the 1952  
4 act, in the passage of the 1952 act, we simply can't assume  
5 that any racial animus or bias was imported through time into  
6 those legislators. You have to look at their --

7 THE COURT: What was the difference between the  
8 1929 act and the 1952 reenactment other than making the law  
9 more punitive? What were the changes?

10 MR. WALKINGSHAW: So with respect to 1326  
11 specifically, your Honor, or generally, or the revisions to  
12 the overall immigration framework?

13 THE COURT: With respect to 1326.

14 MR. WALKINGSHAW: The law is the same.

15 And, your Honor, I think that's not terribly  
16 surprising, given the fact that courts have said time and time  
17 again, I think *Hernandez-Guerrero* cited in our papers, that  
18 it's an essential part of any immigration framework to have a  
19 deterrent to enforce the judgments and the determinations of  
20 the political branches with respect to immigration. If  
21 there's no penalty for violating Congressional determinations  
22 regarding immigration or executive determinations regarding  
23 immigration, then it's, quote, all bark and no bite.

24 I think the statute has been updated  
25 subsequently, but there's never been, subsequent to 1929, and

1 defense points to no evidence whatsoever in the Congressional  
2 Record from 1952 forward, that creating this deterrent that  
3 allows for the enforcement of immigration law was motivated or  
4 driven by animus even when the deterrent value was increased.

5 THE COURT: So it seems, as I understand it, the  
6 government's position is a subsequent reenactment, and  
7 specifically here, the 1952 reenactment, would essentially  
8 cleanse any racial animus that stems from the 1929 enactment?

9 MR. WALKINGSHAW: Yes, your Honor.

10 You know, I'm not really sure -- I guess what I  
11 would say is I'm not sure that the framing of cleansing it is  
12 necessarily --

13 THE COURT: How would you frame it?

14 MR. WALKINGSHAW: Well, I'd frame it, we look to  
15 the decision of the 1952 Congress in passing this law as to  
16 whether or not they had a discriminatory motive, and there's  
17 no evidence that they did.

18 So, you know, there are a number of different  
19 ways you can think about it, but ultimately statements from  
20 more than 20 years prior don't forever taint the subject  
21 matter of the law that was passed.

22 There's no -- there's no basis in the law to  
23 create the sort of disabling mechanism that will prevent  
24 future generations from neutrally considering the sort of  
25 political considerations of public policy that Congress needs

1 to have the power to enact.

2 THE COURT: Do you agree that the defendant has  
3 offered sufficient evidence that the 1929 enactment was  
4 motivated by discriminatory animus?

5 MR. WALKINGSHAW: Your Honor, I think the  
6 initial -- the initial hurdle on the consideration, was it  
7 motivated in part by animus, I think we go into this a little  
8 bit in our papers, it's a very difficult thing to take the  
9 motivation of an entire legislative body out of a few handful  
10 of congressmen.

11 Obviously, the statements that were made were --

12 THE COURT: Well, under *Arlington Heights* they  
13 just have to show that discriminatory intent was a motivating  
14 factor.

15 MR. WALKINGSHAW: Yes. And, your Honor, I would  
16 say that the factor -- the statements here -- I'm sorry, I'm  
17 feeding back and I've lost -- your Honor, can you still hear  
18 me?

19 THE COURT: Yes.

20 MR. WALKINGSHAW: I beg your pardon. For some  
21 reason the screen changed.

22 The statements offered here are deplorable, and  
23 the government certainly would not say that they don't  
24 demonstrate racial animus on the part of those few  
25 congressmen.

1                   We would certainly dispute that the law would  
2 not have been passed absent -- absent the racial animus, but  
3 ultimately that consideration just isn't relevant to the  
4 determination of whether or not the 1952 -- the Congressional  
5 legislators that had -- that passed the 1952 Immigration and  
6 Nationality Act, whether or not they had any racial animus in  
7 passing the law that they passed. There's no dispute that  
8 that's the operative framework at place here, your Honor.

9                   THE COURT: So just so I'm clear, the government  
10 does not concede that the evidence offered is sufficient for  
11 the Court to find that the 1929 enactment demonstrates  
12 discriminatory intent under the *Arlington Heights* standard?

13                  MR. WALKINGSHAW: I mean, ultimately, your  
14 Honor, I think the question is so far removed from the  
15 relevant one. I would say that, yes, the statements from  
16 those legislators would be sufficient were we considering the  
17 1929 law, but we're not.

18                  THE COURT: I understand we're not. I just --  
19 the first step -- well, the defendant's argument stems from  
20 several steps, so I first have to find -- because they're  
21 relying on the 1929 enactment, the legislative history of the  
22 1929 enactment of the statute, to argue that the -- to  
23 demonstrate discriminatory intent.

24                  So you agree that they've offered enough  
25 evidence to demonstrate that the 1929 enactment stems from

1 racial animus under *Arlington Heights*.

2 MR. WALKINGSHAW: Yes, your Honor.

3 THE COURT: And I assume the argument is that  
4 shouldn't carry over to the 1952 reenactment; is that right?

5 MR. WALKINGSHAW: Yes, your Honor. Yes, that's  
6 been -- that's been -- ultimately the *Arlington Heights*  
7 analysis is not informed by those statements from more than  
8 20 years prior to the law's passage.

9 Every Court that has considered this motion, and  
10 several have, that has applied the *Arlington Heights*  
11 framework, has come to the same conclusion.

12 THE COURT: I'm sorry, what was your statement?  
13 Every decision what?

14 MR. WALKINGSHAW: So every Court that has  
15 considered -- as I believe Ms. Gorman referred to earlier,  
16 these motions making this argument have been filed in several  
17 courts around the country. They're cited in our papers.  
18 Ms. Gorman cited one in one of her supplements.

19 Every Court to consider the issue of whether or  
20 not the statements in 1929 were sufficient to meet the initial  
21 burden for later enactments of the criminal immigration law,  
22 every Court has found that the showing of those statements in  
23 1929 is insufficient to show that the later enactments were  
24 driven by discriminatory motive because they don't speak to  
25 the motives of the people making the decisions that were

1 contested.

2 THE COURT: Other than the supplement -- the  
3 decision from the Southern District of California that  
4 Ms. Gorman offered in the first supplement, I don't recall the  
5 government citing to any other decision in their response. If  
6 you can just point out the pages in the response.

7 MR. WALKINGSHAW: Yes, certainly, your Honor.

8 So we attached one as an Exhibit A that's from  
9 the Eastern District of Virginia, and I believe it's also  
10 cited in -- it's cited in our papers --

11 THE COURT: Oh, I think I remember that. I  
12 remember that. Thank you.

13 MR. WALKINGSHAW: And then further there were  
14 other decisions from the Southern District of California, I  
15 believe it's been litigated a number of times.

16 I believe on page 22, in footnote 13, the --  
17 although I believe that was like the -- like the case cited in  
18 the supplement by Ms. Gorman, this was the challenge to 1325  
19 and not 1326. It similarly rejected the premise that laws  
20 validly passed by the people's delegated representatives  
21 decades after racist statements were made can be invalidated  
22 based on a history that the country may not even be aware of.

23 THE COURT: If I were to find that the defendant  
24 has met his burden, the burden shifts to the government on  
25 *Arlington Heights*, and the government would have to show that



1 the statute would not have passed even without the  
2 impermissible purpose, do you think that the government has  
3 met that burden?

4 MR. WALKINGSHAW: Yes, your Honor. It's been  
5 passed over and over and over again -- oh, dear, I'm frozen  
6 again. Your Honor, can you hear me?

7 THE COURT: I can hear you.

8 MR. WALKINGSHAW: Yes. So, your Honor, we  
9 think -- I apologize. This is the most stable Internet  
10 connection I'm able to (inaudible).

11 But, again, this law has been passed over and  
12 over and over again. The 1952 Congress explicitly disclaimed  
13 any theory of racial superiority or Nordic superiority.

14 The 1965 Congress, which was in the throes of  
15 the civil rights movement, explicitly -- they eliminated  
16 nationality quotas.

17 Over and over again Congress has modified, you  
18 know, altered, reconsidered, and repassed immigration  
19 legislation, and in no Congress subsequent to 1929 has -- is  
20 there any indication that any of those decisions were driven  
21 by racial animus.

22 THE COURT: I guess -- so what I'm struggling  
23 with --

24 MR. WALKINGSHAW: It's merely -- it's merely  
25 alleged as something --

1                   THE COURT: Mr. Walkingshaw, I'm trying to  
2 process the argument that the fact of the subsequent  
3 reenactment itself is sufficient for the government to meet  
4 its burden that the law would have passed even without the  
5 impermissible purpose, it seems to eviscerate the government's  
6 burden because any subsequent reenactment would allow the  
7 government to meet its burden.

8                   MR. WALKINGSHAW: Well, your Honor, I think,  
9 again, the Court needs to look at the motivations of the  
10 people making the decision, and so if there's evidence of  
11 racial animus in subsequent enactments, then certainly that's  
12 problematic.

13                   But here there's simply no evidence of racial  
14 animus from 1952 forward. It's entirely premised on  
15 statements more than two decades prior -- the defense motion  
16 is entirely premised on statements made more than two decades  
17 prior to the passage of the operative legislative framework.

18                   THE COURT: Was there any testimony, any  
19 legislative history showing one way or another whether or not  
20 there's discriminatory animus with the 1952 enactment?

21                   MR. WALKINGSHAW: I believe in Ms. Gorman's  
22 supplement she noted -- the passage was -- the -- those  
23 provisions were not discussed on the Senate floor or the House  
24 floor.

25                   But, again, your Honor, it flips the burden

1 which is -- which is a -- which is what the Court recognized  
2 in *Mobile* and in *Abbott versus Perez*.

3 THE COURT: I thought you said that Congress  
4 disclaimed any racial animus in the 1952 enactment that was  
5 passed.

6 MR. WALKINGSHAW: Oh, I'm sorry, that is true,  
7 your Honor. I beg your pardon.

8 So the -- there was -- there was discussion  
9 of -- of -- yeah, of disclaiming any theory of racial  
10 superiority. This is actually in our papers in the discussion  
11 of the legislative history of the 1952 act.

12 But I'm not sure that that was specific to -- I  
13 mean, I'm not sure that it was necessarily specific to the  
14 1325 -- 1325 hadn't been enacted yet, but the illegal reentry  
15 provision, but, again, your Honor, I don't think it needs to  
16 be. I mean, there's really -- there's really no evidence of  
17 anything but legislative good faith in the 1952 act.

18 THE COURT: So it wasn't specific to 1326  
19 because there's no reference to 1326.

20 MR. WALKINGSHAW: Yes. But, again, your Honor,  
21 the -- the overall view and goal of that Congress was to  
22 disclaim any theory of racial or Nordic superiority.

23 THE COURT: I'm sorry, you said the overall goal  
24 of the enactment of the statute was to -- for the purpose of  
25 disclaiming any racial animus?

1 MR. WALKINGSHAW: I beg your pardon, your Honor,  
2 that's perhaps a bit of an overstatement.

3 But it's clear from the legislative history that  
4 in the enactments, to the extent that the -- to the extent  
5 that -- that race -- that Congress people that discussed the  
6 issue disclaimed the theory of Nordic superiority.

7 THE COURT: So to the extent it was discussed,  
8 they disclaimed any racial animus. It wasn't what you said  
9 earlier --

10 MR. WALKINGSHAW: Yes.

11 THE COURT: -- that is, that the whole goal of  
12 the reenactment was for the purpose of disclaiming the prior  
13 discriminatory animus.

14 MR. WALKINGSHAW: Yeah. I beg your pardon, your  
15 Honor, that was an overstatement on my part. That was not  
16 what I meant to say.

17 THE COURT: Okay. So repeat again what you  
18 meant to say.

19 MR. WALKINGSHAW: Yes. Yeah. That would not be  
20 accurate.

21 Yes. Yeah. All I mean to say is that to the  
22 extent that race was discussed, the Congress repudiated  
23 theories of racial superiority and continue to do so going  
24 forward.

25 In 1965, the height of the civil rights

1 movement, it eliminated quotas for -- regarding national  
2 origin.

3 Again, in 1990, Senator Kennedy, Ted Kennedy of  
4 Massachusetts, introduced elements into the immigration  
5 framework to offer temporary protective status that primarily  
6 benefitted individuals from Latin American countries.

7 So to say that this sort of -- it's just simply  
8 not an appropriate framework to judge a law to say that in  
9 1929 this sort of racist seed or taint was planted that runs  
10 forever throughout unless it's specifically identified and  
11 disclaimed is just alien to anything in the law in this area.

12 THE COURT: What's the government's position on  
13 an evidentiary hearing?

14 MR. WALKINGSHAW: Again, your Honor, I strongly  
15 believe it would be unnecessary, that the precedents we've  
16 cited and some of the precedents that were cited by the  
17 defendants, including *Department of Homeland Security versus*  
18 *the Regents of the University of California* in which the Court  
19 decided it didn't need to determine what the appropriate  
20 framework was to judge the termination of DACA, even if we  
21 apply *Arlington Heights*, the -- even if we apply *Arlington*  
22 *Heights*, the plaintiffs can't say the claim because the  
23 statements were remote in time and separate context.

24 So even -- even assuming for purposes of  
25 argument that the 1929 law was entirely driven by racial

1 animus, which we don't concede, we think there are valid  
2 reasons for passing this law, as we've discussed, to establish  
3 a deterrence, to prevent or to enforce Congress's immigration  
4 mandates, nonetheless, the appropriate -- even when prior  
5 discrimination has been found, the appropriate source of  
6 inquiry is 1952, and no evidence to that effect has been  
7 produced by the defense.

8 THE COURT: Well, but you mentioned earlier that  
9 to the extent that race was discussed with the 1952  
10 reenactment, that Congress repudiated any racial animus and  
11 that they did that going forward with every reenactment.  
12 Doesn't that warrant --

13 MR. WALKINGSHAW: Yes, your Honor.

14 THE COURT: -- some kind of evidentiary hearing  
15 on that issue when the defendant's position is there was  
16 no such evidence?

17 MR. WALKINGSHAW: I don't -- well, your Honor, I  
18 think all of these things are -- all of these are subject to  
19 the Congressional Record and are matters of public notice, so  
20 they're the sort of things the Court can review.

21 But, again, while we certainly agree -- while --  
22 the government's position is certainly that if the Court looks  
23 to subsequent enactments, it would find good faith and find  
24 that would be -- that 1326 would be passed absent any --  
25 absent any racial animus.

1           The fact is that it was passed initially in 1952  
2     in the absence of any racial animus, and that passage is what  
3     the Court should focus its inquiry on, and no evidence has  
4     been put forward to suggest that the motivations of those  
5     legislators were driven in any way by racial animus.

6           THE COURT: Thank you. Anything else,  
7     Mr. Walkingshaw?

8           MR. WALKINGSHAW: Not unless the Court has any  
9     further questions, your Honor.

10          MS. GORMAN: Your Honor, may I briefly respond?

11          THE COURT: Yes.

12          MS. GORMAN: Thank you.

13          So, first of all, I think the Court highlighted  
14     why it is so important to have a historian come and talk about  
15     this legislation, particularly as the government focuses on  
16     the 1952 reenactment which it concedes contains no discussion  
17     and simply adopted and reinforced the 1929 statute.

18          And one thing I read into the record was  
19     Truman's veto, and why I highlight part of the reason why he  
20     vetoed it is because it was a continuation of the national  
21     origins quota, and it -- what it did end in terms of race, I  
22     think its only acknowledgment of race, was that it ended  
23     race-based exclusions of Asians and exchanged it for small  
24     quotas on them, but it continued the highly restrictive and  
25     very controversial national origins system and its privileged

1 entry by highly-skilled immigrants.

2 And to the extent the government wants to rely  
3 on this 1952 reenactment, which is absolutely silent as to  
4 1325 and 1326, I also want to note for the record, in addition  
5 to the importance of having an evidentiary hearing and having  
6 a historical scholar actually testify about the context of the  
7 legislative history is -- for example, in 1954, and this is  
8 after the 1952 act, that was Operation Wetback, and that was  
9 pursuant to this piece of legislation.

10 I think Operation Wetback -- I don't think that  
11 there's any sort of disagreement that in 1954 and today it's  
12 very clear that wetback refers to Mexicans, and that was  
13 following something that the government talked about in its  
14 briefing, the Bercerra program, where the United States  
15 essentially permitted illegal immigrants to come in and to  
16 essentially do agricultural work, and then there was a  
17 backlash against it where you have Operation Wetback, again in  
18 1954, which decided to repatriate Mexicans, including Mexican  
19 [sic] citizens. So pursuant to that over a million Mexicans,  
20 including American citizens, were deported to Mexico.

21 So the idea that 1952 was somehow -- that we  
22 were living in a postracial world, when there's one Latino  
23 congressman who was even in Congress at all in 1952, I think  
24 is -- it sort of exemplifies that this new law's racist  
25 origin, of course, continued from 1925, and it's the silence



1 on that history that allows these racially invidious laws to  
2 continue.

3 I mean, and so I think the Court sort of makes  
4 or agrees with the main point that if we take the government  
5 at its word that any reenactment essentially cleanses  
6 legislation, no matter of how racist, no matter how eugenical,  
7 no matter how despicable to at least our stated race-neutral  
8 values, then we would never be able to challenge on Equal  
9 Protection grounds laws as racist as this one.

10 And one important thing that the government does  
11 not dispute, I would highly dispute that 1952 represented a  
12 repudiation of anything racist, but I think the silence of the  
13 1952 legislature and its willingness to adopt in whole a  
14 statute that is clearly derivative of eugenical concerns sort  
15 of makes its own point, that we can't use reenactments to  
16 cleanse laws, particularly if they refuse to even acknowledge  
17 that eugenics is racist.

18 And if you -- it is incumbent on every  
19 legislator who passes a law to understand the legislation that  
20 they are passing, and we have to infer from the fact that they  
21 were willing to reenact 1326, or recodify 1326 in the same  
22 form as 1929, unless -- I mean, it adopts also the reasoning  
23 of the prior legislature, it doesn't cleanse it, it doubles  
24 down on it, and -- pardon me, your Honor.

25 THE COURT: Do you want to address the cases

1 that Mr. Walkingshaw cites to, including the *Regents of the*  
2 *University of California* and his reference to DACA in terms of  
3 reenactment in terms of what the Court can consider?

4 MS. GORMAN: And I want to at least make sure  
5 that I am addressing the right cases.

6 As I understand it, the DACA decision accepted  
7 the *Arlington Heights* framework but rejected the comments of  
8 Donald Trump in striking it down, but I also want to make sure  
9 that I'm talking about the correct case.

10 So if the Court of would be so generous as to  
11 provide a citation, I can, of course, address it.

12 THE COURT: I think you at least summarized the  
13 argument, as I understand it from Mr. Walkingshaw, the case is  
14 *Department of Homeland Security versus Regents of the*  
15 *University of California*, 140 Supreme Court 1891. It was  
16 issued -- the decision was issued June 18, 2020.

17 MS. GORMAN: Court's indulgence, your Honor. I  
18 just want to make sure that -- because I know that when the  
19 government initially contextualized that was with respect to  
20 whether *Arlington Heights* applies at all, so that is where I  
21 focused my arguments, so I want to make sure that I am  
22 responding to something relevant in what the Court is saying  
23 or in what the government's argument is.

24 THE COURT: I can also have Peggie email you the  
25 case if you aren't able to pull it up.

1 MS. GORMAN: I'm able to pull it up, your Honor.

2 MR. WALKINGSHAW: And, your Honor, once  
3 Ms. Gorman is done reviewing the case and responding, if I  
4 could have a brief bit of time to respond as well, I would  
5 appreciate it.

6 (Proceedings paused.)

7 MS. GORMAN: Your Honor, at least as I  
8 understand it, while it was rejected on its fact, the DACA  
9 decision in *Homeland Security v Regents of the University*  
10 *California* partially supports this claim because it wasn't  
11 distinguished on the facts.

12 So one of the -- the Court states to plead  
13 animus, the plaintiff must raise a possible inference that  
14 this invidious discriminatory purpose was a motivating factor  
15 in the relevant decision, which I believe that we have shown  
16 in this case particularly as the 1952 legislative session  
17 simply adopted the 1929 law.

18 And so they did not have the kind of evidence  
19 that we have in this case which is this lengthy history that  
20 precedes the 1929 enactment, including the legislative history  
21 which is in the record.

22 So whether or not -- and this case was  
23 ultimately distinguishable on its facts and whether or not  
24 Donald Trump or the ultimate rescission memo, or whether Donald  
25 Trump's comments were relevant to the rescission memo, these

1 are relatively factually nuanced distinctions.

2 But at the end of the day I think this DACA  
3 decision actually does support at least the general principle  
4 that if you can point to the racial animus as a motivating  
5 factor in a decision, and in this case we're referring to a  
6 statute, that *Arlington Heights* applies.

7 THE COURT: If I were to -- so since the  
8 government has already conceded that the 1929 enactment stems  
9 from discriminatory animus, what would be the purpose of the  
10 evidentiary hearing?

11 MS. GORMAN: So if the government's contention  
12 is that in 1952 that the entire purpose of the law was to  
13 disclaim racial animus, I -- I think that any sort of  
14 historian would happily rebut that.

15 And, in particular, one of the two historians  
16 that we propose testify at an evidentiary hearing is Professor  
17 Hernandez. She's an endowed chair at UCLA and has studied the  
18 topic in depth.

19 And this topic has actually been subjected to a  
20 lot of academic analysis, and there are multiple academics  
21 that we can bring to testify in front of this Court.

22 One thing that I think the government does not  
23 dispute was that in 1952 there was -- they simply decided to  
24 carry forward the 1929 law, and the 1929 legislature was  
25 clearly motivated by racial animus which satisfies *Arlington*

1 *Heights.*

2           So this reliance on a reenactment that the Ninth  
3 Circuit has explicitly recognized never reckoned at all with  
4 the racial motivations for the law is simply insufficient to  
5 cleanse it.

6           To the extent that the Court has broader  
7 questions about this 1952 legislation and whether it could  
8 possibly cleanse the racial animus that was the reason for the  
9 passage of this law, then I think testimony from a historian  
10 is important to contextualize it.

11           I mean, there's a reason why President Truman  
12 vetoed this law, and it was particularly this relatively  
13 controversial national origins part of the 1929 legislation.

14           But in 1952 they essentially reorganized and  
15 made some modifications to a large host of immigration  
16 statutes, and the one that they chose to leave untouched was  
17 the criminalization of migration, and that was for a very  
18 specific reason, and we see that post 1952.

19           I mean, the idea that in 1952 we were living in  
20 a world without racism I think is ridiculous. I pointed out  
21 before in 1954 we decided to repatriate Mexicans in Operation  
22 Wetback.

23           So if we really want to say that the 1952  
24 legislature, while adopting this law in whole cloth was a  
25 repudiation of racism, I think that that is undermined by the

1 historical record, and it would be illuminating to have the  
2 testimony of a historian, particularly one who is so well  
3 steeped in this legislative history.

4 THE COURT: And so is that individual Professor  
5 Hernandez?

6 MS. GORMAN: Yes. There's also Professor  
7 O'Brien who offered to testify. I don't believe he submitted  
8 a declaration in connection with the motion.

9 But I have reached out to Professor Hernandez  
10 and Professor O'Brien who both expressed that they would  
11 happily come and speak to this Court.

12 I believe Mr. O'Brien -- or Professor O'Brien is  
13 a professor at UCSD and Professor Hernandez at UCLA, and both  
14 have written extensively on this topic.

15 This subject has actually been the subject of a  
16 lot of academic debate. I think the idea of looking at this  
17 law through an Equal Protection lens was probably precipitated  
18 by the 2019 introduction of the New Way Forward Act that  
19 explicitly recognized that 1929 -- that the origin of 1326 and  
20 1325, which I recognize is not at issue here, but the 1326 at  
21 least has a racist origin that stems back from the '20s.

22 And the United States Attorney has proudly held  
23 up this hundred-year history. That was one of the reasons why  
24 I submitted the US Attorney Bulletin, that it's only when  
25 subjected to an Equal Protection analysis that the United

1 States Attorney wants to walk back this sort of proud  
2 endorsement of this hundred-year law.

3 But the fact is 1952 just carried it forward,  
4 and it is certainly not sufficient to cleanse it of its racial  
5 animus.

6 And we don't live in a race-blind world. We  
7 certainly didn't in 1952, and historically it has been the  
8 courts who have the courage to actually discuss and talk about  
9 these legislations and what they mean in the context of the  
10 Constitution.

11 I mean, 1952 was before *Brown V Board of*  
12 *Education*. So we're talking about -- you know, a world  
13 where -- you know, the segregated world where that was okay,  
14 and so the idea that 1952 somehow cleansed it because they  
15 didn't talk about it is, I think, ridiculous.

16 But I also think the historian might be helpful  
17 to shed additional light on it, particularly as that's the  
18 government's position.

19 THE COURT: All right. Thank you.

20 Mr. Walkingshaw?

21 MR. WALKINGSHAW: Your Honor, just a few points  
22 quickly, and I really don't know how it got to this point, but  
23 it is certainly not the government's position, nor is it the  
24 government's burden to prove that 1952 was free of racism.

25 It's the defendant's burden to prove that the

1 challenged action was driven by racism, and, in this case, no  
2 evidence has been offered.

3 The entirety of the declaration submitted in  
4 support of -- or by Professor Hernandez revolves around the  
5 1929 law. The entirety of the defendant's briefing revolves  
6 around the 1929 law.

7 And Ms. Gorman's statement that there was a  
8 backlash in 1954 to the 1952 law, that several -- that a large  
9 number of Mexicans were repatriated as a backlash of the 1952  
10 law, you know, certainly doesn't support the fact that the  
11 1952 law was racist.

12 Again, the point of inquiry for this Court is  
13 not whether or not the world was free of racism in 1952, it  
14 certainly wasn't. It certainly -- racism is certainly  
15 something the Court should be concerned with --

16 THE COURT: It still isn't.

17 MR. WALKINGSHAW: -- something that anyone --  
18 exactly. It's something that anyone interested in justice  
19 should be concerned with.

20 But the framework set forth by *Arlington Heights*  
21 requires a serious inquiry into whether the decision that was  
22 actually taken was driven by racism, and no evidence has been  
23 put forward to that effect.

24 And just very quickly, your Honor --

25 THE COURT: Well, I understand that the



1 government -- you want to start from the 1952 reenactment  
2 whereas the defendant's argument is the 1929 enactment, and  
3 the absence of any repudiation with the subsequent  
4 reenactment, should be considered by the Court.

5 So I understand the arguments. I think that's  
6 why -- the defendant is focused on 1929, and the government is  
7 focussing on all the subsequent reenactments going forward.  
8 Am I right?

9 MR. WALKINGSHAW: Although I would -- I would  
10 say, your Honor, the only -- the distinction I would make is  
11 it was a 1952 enactment so that it --

12 THE COURT: Yes, 1952.

13 MR. WALKINGSHAW: -- the immigration and  
14 nationality law, yes, is that it was an entirely new set of  
15 statutes, and that's the operative framework.

16 But, yes, that's the central point of our -- of  
17 our disagreement, I think, is that the 1929 law is 20 years  
18 removed from what this Court's point of inquiry should be.

19 THE COURT: Thank you. I cut you off. I didn't  
20 know if there was something else you wanted to mention,  
21 Mr. Walkingshaw.

22 MR. WALKINGSHAW: Just very briefly, your Honor,  
23 with respect to *Department of Homeland Security versus*  
24 *Regents*, again, that was actually a case that was cited in the  
25 defendant's papers, in their moving papers, and it was cited

1 for the proposition that I believe five justices thought that  
2 the Arlington Heights framework should apply. That's actually  
3 not true, your Honor.

4 If you look at the decision, it says that two  
5 alternative frameworks were proposed, and this actually wasn't  
6 one in which plenary deference that Congress's congressional  
7 authority was -- was advocated, that the government argued  
8 that -- that the claims brought forth by the plaintiffs were  
9 actually in effect a defense to deportation in the vein of  
10 selective prosecution.

11 When the Court cited -- and I'm quoting here,  
12 "We need not solve this debate because the  
13 Equal Protection claim fails on its merits."

14 And eight justices agreed on that point that the  
15 plaintiffs had not stated an Equal Protection claim.

16 So it's not correct to say that *Department of*  
17 *Homeland Security versus Regents* stands for the proposition  
18 that the *Arlington Heights* framework applies.

19 It was assumed for purpose of argument, because  
20 even taking the plaintiffs' standard of review at face value,  
21 even if adopting that standard, the claims would still fail.

22 Now, I understand the Court is proceeding on the  
23 assumption that the *Arlington Heights* framework applies here.  
24 I don't mean -- but I just wanted to be clear on what that  
25 case said.

1 THE COURT: Thank you.

2 Ms. Gorman, I just have one question for you  
3 with respect to the testimony that would be offered at the  
4 evidentiary hearing should I have one.

5 And it sounds like, based on the information  
6 presented in the motion, the two experts would just testify on  
7 the legislative history with the 1929 enactment and not the  
8 1952 enactment; is that right?

9 MS. GORMAN: Your Honor, my understanding is  
10 that both historians would trace our current system of 1326  
11 and 1325 prosecutions to the 1929 -- to the 1929 law and can  
12 contextualize any sort of subsequent reenactment which the  
13 government has already conceded in 1952 they were absolutely  
14 silent.

15 But my understanding is not just that they were  
16 saying that the 1929 law was animated by eugenics and  
17 ultimately resulted from a compromise between avowed  
18 eugenicists and a desire for cheap Mexican labor but the ways  
19 in which that law carried forward in subsequent reenactments.

20 So I do think that those historians would be  
21 important to the extent that the Court finds that the silence  
22 of the 1952 legislature is insufficient to show that it  
23 essentially adopted the racial animus of 1929.

24 I mean, the 1952 -- again, the idea that you can  
25 reenact something that is so clearly motivated by racial

1 animus without talking about it, and that that would be  
2 sufficient to cleanse it from that animus I think is a  
3 separate and independent point.

4 But to -- to -- if the Court is concerned  
5 especially regarding that 1952 reenactment, or somehow thinks  
6 that the silence satisfies the burden that it would have been  
7 reenacted despite this animus, I think that that testimony can  
8 be helpful.

9 But I will also say that in light of the  
10 government's concession that the 19 -- which has also been  
11 recognized by the Ninth Circuit, that the 1952 reenactment was  
12 absolutely silent about 1925 and 1926, they --

13 THE COURT: You mean 1325 and 1326. You said  
14 1925 and 1926.

15 MS. GORMAN: Oh, sorry, I conflated the two.

16 But to the extent that the government's argument  
17 is that their silence is sufficient should the Court find that  
18 the *Arlington Heights* -- that the initial showing of *Arlington*  
19 *Heights* has been made by the defense, and the burden shifts to  
20 the government to show that it would have been reenacted  
21 despite this animus, this silence of the 1952 legislature on  
22 1326 is sort of very obviously insufficient to overcome it  
23 because it was never actually discussed, and so how could  
24 anybody ever prove that without racial animus this law would  
25 be discussed when it was adopted and carrying forward a

1 clearly racist law with no discussion, so that standard can  
2 never be met.

3 THE COURT: I think it would be helpful for me  
4 to hear from the two experts. I'm going to set an evidentiary  
5 hearing.

6 Peggie will work with counsel to find a  
7 convenient time in the next couple of weeks for that  
8 evidentiary hearing to be held, and I'm willing to accommodate  
9 them if they would want to testify by video as well.

10 MS. GORMAN: My understanding is that they would  
11 testify by video.

12 THE COURT: So Peggie will work with counsel to  
13 find time for the evidentiary hearing, and, Ms. Gorman, how  
14 much time do you think should be allocated?

15 MS. GORMAN: Would it be all right if I emailed  
16 Ms. Vannozzi after I speak with both experts?

17 THE COURT: Yes.

18 MS. GORMAN: Thank you, your Honor.

19 THE COURT: All right. Thank you, counsel.

20 -o0o-

21  
22 I certify that the foregoing is a correct  
23 transcript from the record of proceedings  
in the above-entitled matter.

24 /s/Margaret E. Griener 1/27/2021  
25 Margaret E. Griener, CCR #3, FCRR  
Official Reporter

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